A

PP

v.

HWONG YU HEE & ORS

B

HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG J
[CRIMINAL APPEAL NO: MYY-42AC-4-7-2013]
24 JANUARY 2014

C ***CRIMINAL PROCEDURE:*** *Appeal - Irregularity or illegality - Defect in notice of appeal by prosecution - Failure to clearly state charges appealed against - Whether prosecution filed application to condone irregularity pursuant to s. 310 Criminal Procedure Code - Whether notice of appeal ought to be struck out*

D

The three accused persons faced with five charges under s. 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') were acquitted and discharged by the Sessions Judge at the end of the prosecution's case on the ground that the
E prosecution had failed to make out a *prima facie* case. On appeal, the High Court found that the prosecution had established a *prima facie* case and the accused persons were called to enter their defence before the Sessions Judge. Dissatisfied with the ruling of the High Court, the accused persons appealed to the Court of
F Appeal wherein their appeal was dismissed on the ground that the decision was not appealable as it was a ruling made in the course of a trial which did not finally dispose of the rights of the parties and the cases were sent back for the accused to enter their defence. At the end of the trial, the trial judge ruled that the
G prosecution had failed to prove the charges against the accused persons beyond reasonable doubt and they were accordingly acquitted and discharged. Hence, this appeal by the prosecution. The issue in this appeal was whether the appeal was defective or irregular so that the appeal becomes null and void and should be
H dismissed.

Held (striking out notice of appeal *in limine*):

(1) The notice of appeal did not state and did not refer to the five charges or five counts which were preferred against the
I accused persons in the Sessions Court and for which they had been acquitted and discharged. Instead, the notice of appeal filed by the prosecution ('DPP') stated that the appeal was in respect of only three counts for which the accused

were acquitted and discharged. There was no reference to any appeal against the acquittal and discharge in respect of the other two counts or two charges. The notice of appeal also did not state whether the appeal was in respect of any error in law or in fact. (paras 9, 10 & 13)

(2) Even if the appeal was in respect of three charges or three counts only, as stated in the notice of appeal, the DPP did not set out which of the three charges out of the five charges were the subject matters of the appeal and for which they had been acquitted and discharged. Reading the notice of appeal, the accused persons would not be in any position know and should not be left wondering which of the three out of the five charges were on appeal against them. The notice of appeal was, as it stood, defective. (paras 14-15)

(3) In view of s. 310 of the Criminal Procedure Code ('CPC'), as soon as the DPP had filed the notice of appeal and realised that there was an irregularity, she should file an application immediately to condone the irregularity in the notice of appeal and provide the reasons for the court to condone the irregularity. The courts are liberal in condoning application to file out of time the petition of appeal but not to notice of appeal. The discretion should not be exercised or sparingly exercised when it relates to notice of appeal by the public prosecutor as opposed to an accused. The discretion also should not be exercised to the detriment of the accused or respondent in view of the provision of art. 5(1) of the Federal Constitution which gives special protection to the accused (*Veerasingam v. PP; PP v. Ismail Abd Wahab*, refd). (paras 16-17)

(4) The DPP did not submit that it was a mere typing error and that there was no prejudice or injustice caused to the accused persons arising from the irregularity. The DPP was absent and chose not to attend the hearing, nor to explain the irregularity and whether it could be cured under s. 400 of the CPC. There was no application by the DPP to amend the notice of appeal or for an extension of time to amend the notice of appeal and to file an amended notice of appeal. Therefore, the notice of appeal was defective and incompetent and ought to be struck out *in limine*. (para 18)

Case(s) referred to:
Muhamad Ash Bakar v. PP [1966] 1 LNS 496 ***(refd)***
PP v. Ismail Abd Wahab [2013] 6 CLJ 588 CA ***(refd)***
PP v. Mahathir Muhammad [2013] 2 CLJ 50 CA ***(refd)***
Veerasingam v. PP [1957] 1 LNS 93 HC ***(refd)***

Legislation referred to:
Anti-Trafficking In Persons And Anti-Smuggling Of Migrants Act 2007, s. 12
Courts of Judicature Act 1964, s. 26
Criminal Procedure Code, ss. 303A, 307, 310, 422
Federal Constitution, art. 5(1)

For the prosecution - Nur Nisla Abd Latif; DPP
For the 1st respondent - Shankar RP Asnani; M/s Thomas, Shankar Ram & Co
For the 2nd respondent - Arthur CA Lee; M/s Arthur CA Lee & Partners
For the 3rd respondent - SH Lim; M/s SH Lim & Co

[Appeal from Sessions Court, Miri; Criminal Case No: MYY-62AT-2-4-2012]

Reported by S Barathi

JUDGMENT

Stephen Chung J:

[1] On 30 July 2013, the DPP filed a notice of appeal that "the Public Prosecutor being dissatisfied with the order of the Learned Session's Court Judge at Miri made on the 26 July 2013 hereby the respondents who were charged under s. 12 of the Anti-Trafficking In Persons And Anti-Smuggling Of Migrants Act 2007 (three counts), were acquitted and discharged, and hereby appeals to the High Court against the said order". This appeal is against the order of acquittal and discharge at the end of the trial.

[2] I shall set out the chronology of events. Previously, at the end of the prosecution's case, the learned trial judge had made the ruling that the prosecution had failed to make out a *prima facie* case against all the three accused. He had accordingly acquitted and discharged the three accused in respect of all the five charges against them.

[3] The prosecution filed an appeal against the order of acquittal and the appeal was heard before me. On 6 February 2013, I gave my ruling that based on the appeal record the prosecution had made out a *prima facie* case against each of the three accused

persons under each of the five charges under s. 12 of the Act. They were called to enter their defence to the five charges made against them before the trial judge in the Sessions Court. A

[4] Each of the accused persons appealed to the Court of Appeal against the decision that the prosecution had made out a *prima facie* case against the accused persons. The Court of Appeal dismissed the appeal on the ground that the decision was not appealable because it was a ruling made in the course of a trial which did not finally dispose of the rights of the parties and the two cases were sent back for the accused to make their defence. B C

[5] At the end of the trial, after the accused persons had testified and called witnesses to testify in the trial, the trial judge ruled that the prosecution had failed to prove the charges against the accused persons beyond any reasonable doubt because there were too many gaps and loopholes in the evidence adduced by the prosecution. He acquitted and discharged all three accused. D

[6] On 11 September 2013, this appeal came before me. The learned DPP was absent. Counsels advised that the record of appeal was not ready and the court fixed the next date for hearing the appeal. E

[7] On 28 October 2013, DPP Musli stood in for DPP Nur Nisla Bt Abd Latif who was prosecuting the trial and the appeals. The learned DPP informed the court that all submissions had been filed but not served and parties requested for another date for the hearing ie, 7 November 2013. F

[8] On 7 November 2013, the DPP who was in charge of the appeal was absent. Counsels complained that the DPP did not serve submissions on them and they found out that the submissions were only filed on that morning ie, it was dated 7 November 2013. The learned counsels submitted that the DPP did not appear to be interested in the appeal, her submissions did not deal with the defence raised during the trial, the submissions were filed at the last minute and the appeal was shoddy and should be struck out or dismissed. It appeared that her submissions were a reproduction of her earlier submissions in the appeal at the end of the prosecution's case. G H

[9] I refer to the notice of appeal in this case. It must be noted that the notice of appeal stated that the appeal is in respect of three (3) counts only for which the accused were acquitted and discharged. Very clearly the notice of appeal did not state and did I

not refer to the five charges or five counts which were preferred against them in the Sessions Court and for which they had been acquitted and discharged.

[10] Based on the notice of appeal filed by the DPP, the appeal is only against three counts or three charges for which they had been acquitted and discharged by the Sessions Court. There was no reference to any appeal against the acquittal and discharge in respect of the other two counts or two charges. The question is whether the appeal is defective or irregular so that the appeal becomes null and void and should be dismissed.

[11] The criminal jurisdiction of the High Court to hear appeals from the subordinate courts is set out in s. 26 of the Courts of Judicature Act 1964 (CJA) which provides that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from the subordinate courts according to any law for the time being in force within the territorial jurisdiction of the High Court. This criminal jurisdiction is conditioned by the filing of a notice of appeal by an aggrieved person.

[12] Section 307 of the Criminal Procedure Code (CPC) provides that any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged severity or of the alleged inadequacy of any sentence by lodging, within 14 days from the time of the judgment, sentence or order being passed or made. Section 303A provides that any reference to a Magistrate's Court shall be deemed to include a reference to a Sessions Court.

[13] As stated above, the notice of appeal filed by the DPP is in respect of three counts only and did not appeal against all the five charges preferred against the accused. There is no other notice of appeal in respect of the other two charges or counts or in respect of all five charges against the three accused persons. The notice of appeal also did not state whether the appeal is in respect of any error in law or in fact.

[14] Although the DPP has referred to and set out all five charges in the petition of appeal, the DPP did not explain that it was an error or an irregularity and whether the appeal is in respect of three charges or three counts only or in respect of all five charges against the accused. In *PP v. Mahathir Muhammad*

[2013] 2 CLJ 50; [2013] 1 MLJ 50, the DPP in that case submitted that the question of law need not be set out in the notice of appeal and that it could be set out subsequently in the petition of appeal. In that case the Court of Appeal rejected this submission. Obviously the petition of appeal cannot amend and improve the notice of appeal without the leave of the court.

[15] If the appeal is in respect of three charges or three counts only as stated in the notice of appeal, she did not set out which of the three charges out of the five charges which were the subject matters of the appeal and for which they had been acquitted and been discharged. Reading the notice of appeal the accused would not be in any position to know and should not be left wondering which of the three out of the five charges are on appeal against them. The notice of appeal as it stands is defective.

[16] Section 310 of CPC provides that a judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions as the judge shall consider desirable in order that substantial justice may be done in the matter. As soon as the DPP has filed the notice of appeal and realised that there is an irregularity, she should file an application immediately to condone the irregularity in the notice of appeal and provide the reasons for the court to condone the irregularity.

[17] From decided cases, courts are liberal in condoning application to file out of time the petition of appeal but not to notice of appeal: see *Veerasingam v. PP* [1957] 1 LNS 93; [1958] MLJ 76, *Muhamad Ash Bakar v. PP* [1966] 1 LNS 496. In *PP v. Ismail Abd Wahab* [2013] 6 CLJ 588; [2013] MLJU 308, it was held that the discretion should not be exercised and or sparingly exercised when it relates to notice of appeal by the Public Prosecutor as opposed to an accused. The Court of Appeal in that case went on to say that such discretion should not be exercised to the detriment of the accused or respondent in view of the provision of art. 5(1) of the Federal Constitution which gives special protection to the accused.

[18] In this appeal, the DPP did not submit that it was a mere typing error and that there was no prejudice or injustice caused to the accused persons arising from the irregularity. The DPP was absent and chose not to attend the hearing, nor to explain the irregularity and whether it could be cured under s. 422 CPC. Up to date there is no application by the DPP to amend the notice of appeal or for an extension of time to amend the notice of appeal and to file an amended notice of appeal.

[19] For the reasons given, the notice of appeal is defective and incompetent and ought to be struck out *in limine*.